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January 7, 2005

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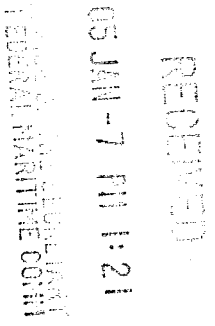

Mr. Bryant L. VanBrakle
Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Room 1046
Washington, DC 20573

Re: Non-Vessel Operating Common Carrier Service Arrangements, Docket No. 04-12

Dear Mr. VanBrakle:

Transmitted herewith for filing are an original and 15 copies of a Petition of the International Shippers' Association for Reconsideration and Stay of the Commission's decision and rule in the above captioned proceeding.

Respectfully submitted,

INTERNATIONAL SHIPPERS' ASSOCIATION, INC.

By Alan F. Wohlstetter
Alan F. Wohlstetter
Its General Counsel

Enclosures (16)

CC: OSJ OGC

ORIGINAL

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Before the Federal Maritime Commission

Docket No. 04-12

NON-VESSEL OPERATING COMMON CARRIER SERVICE ARRANGEMENTS

PETITION OF THE INTERNATIONAL SHIPPERS' ASSOCIATION FOR RECONSIDERATION AND STAY

The International Shippers' Association (ISA) hereby petitions the Commission, pursuant to Rule 261 of the Commission's Rules of Practice and Procedure, for reconsideration of the Commission's decision to the extent that it prohibits NVOCCs and shippers' associations with NVOCC members from participating as shippers in NVOCC service arrangements (NSAs).[1] ISA also petitions for a stay of the rule issued in this proceeding until a final decision is rendered on this petition by the Commission.

INTRODUCTORY

In our comments on the proposed rule which is the subject of this docket, we supported the Commission's attempt to free NVOCC's from the filing of tariffs provided the benefits of the proposed rule could be enjoyed by smaller shippers' associations, like ISA and their NVOCC members. However, the suggestions we advanced to accomplish this were discarded without discussion.

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1. To the extent that the Commission believes that this petition should not be accepted under Rule 261 of its Rules of Practice and Procedure, we ask that a waiver be issued under Rule 10 in order to prevent "undue hardship [and] manifest injustice," as well as hopefully to obtain administrative relief, thereby precluding the need for judicial review.

As will be seen from our discussion below, we believe that a substantial question exists as to whether the Commission, as a creature of Congress, can grant relief from NVOCC tariff filing since that was rejected during the discussion of the bill which became the Ocean Shipping Reform Act of 1998 (OSRA). We submit that the lack of jurisdiction becomes even clearer when one considers that the restriction the Commission has imposed disadvantages the smaller NVOCC, a concern expressed by Senator Gorton in the Congressional Record. It makes little sense to conclude that the Commission has the ability to tilt the level playing field between small and larger NVOCCs through its restriction, which deprives smaller NVOCCs of the right to purchase ocean transportation at non-tariff rates.[2]

If we had a choice we would prefer that the Commission modify its rule to remove this inequity, either by eliminating the restriction in the rule which precludes shipper NVOCC agreements or by adopting the amendment set forth in this petition which would obviate the Commission's concern with antitrust immunity.

However, if this is not to be and the Commission determines to go forward with the rule, which we believe is slanted in favor of larger NVOCCs, we would prefer to have no rule and therefore feel compelled to strongly assert the position that the proposed rule is beyond the Commission's jurisdiction.

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2. Presently costs of all NVOCCs are reflected in the tariff rates required by statute. Because of the restriction in the rule, only larger NVOCCs will be able to keep their costs confidential.

GROUNDS FOR RECONSIDERATION

1. The Commission Exceeded its Statutory Authority in Issuing the NSA Rule.

Although we support the concept of relief from tariff publication by NVOCCs, there is a significant question as to whether the Commission exceeded its statutory authority in issuing this rule. We raise this issue solely because of the restriction the Commission attached to the rule which prohibits NVOCCs and their shippers' associations from shipping under NSAs. The result of this restriction is to withhold the full benefits of NSAs from smaller NVOCCs and their shippers' associations, thus destroying the uniform treatment of NVOCCs which Congress provided for under OSRA.

We maintain that section 16 of the Shipping Act, as amended, does not empower the Commission to create a new right which Congress specifically declined to authorize, specifically, the right of NVOCCs to enter into service contracts or agreements [3] in lieu of tariff rates.

The Commission's authorization of NSAs conflicts with the statutory scheme of OSRA, specifically section 8(a) of the Act, which requires that NVOCCs publish tariffs

3. The Senate considered and declined to adopt a proposed amendment to Senate Bill S.414, which became OSRA, which would have authorized NVOCCs to enter into service contracts on the same terms as vessel operators. 105 Cong. Rec., Senate, 6109, et seq. The Commission cannot get over this hurdle by calling NSAs shipper arrangements, rather than service contracts.

and section 8 (c), in which Congress specifically authorized only VOCCs to enter into service contracts with confidential rates in lieu of charging published tariff rates. In doing so, Congress rejected an amendment proposed by Senator Gorton which would have conferred this same right on NVOCCs.[4] Clearly, the Federal Maritime Commission, a creature of Congress, cannot do under its exemption power exactly what Congress declined to do when that suggestion was advanced by a proffered amendment to the bill which became OSRA. See footnote 3, supra.

We further maintain that the decision on which the Commission relies, California v. Federal Energy Regulatory Commission, 383 F.3d 1006 (9th Cir. 2004).[5] does not support the Commission's claim that it has statutory authority to issue the NSA rule: first, because that decision does not involve the Shipping Act; and, second, because that decision does not stand for the proposition that a federal administrative agency may grant an exemption from a statutory tariff requirement enacted by Congress. The Court held only that the agency properly allowed tariff filing subject to conditions which enabled the agency to find that the tariff rates were just and reasonable as required by the agency's statute. That case does not support a holding that the Commission's exemption authority lawfully permits it to modify the Shipping Act by eliminating the requirement that NVOCCs must publish and charge tariff rates.

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4. 105 Cong. Rec., Senate 6109-6115, quoted in part in footnote 6, infra.

5. Notice of Proposed Rulemaking, p. 8.

2. The Restriction against NVOCCs Participating as Shippers under NSAs Will Result in a Substantial Reduction in Competition by Smaller NVOCCs.

The Commission has not addressed the substantial reduction in competition by smaller NVOCCs vis-a-vis larger NVOCCs which is the unavoidable result of the prohibition against NVOCCs being shipper parties to NSAs. The adverse impact of this restriction on the ability of small NVOCCs to compete with large NVOCCs is a material fact which the Commission did not consider in making its finding that the authorization of NSAs will not result in a substantial reduction in competition. The record before the Commission in the form of comments shows, and the Commission with its administrative expertise may take official notice of the fact that smaller NVOCCs do not have the cargo volumes necessary to enter into service contracts with vessel operators and must turn their shipments over to larger NVOCCs for consolidation and movement under the carrier NVOCCs' service contracts with VOCCs. The subject rule specifically restricts these smaller NVOCCs from negotiating lower than tariff rates because they purchase underlying ocean transportation from NVOCCs rather than VOCCs (vessel-operating common carriers).

Under the restriction in the subject rule, ISA and its NVOCC members are required to pay published tariff rates when they purchase underlying transportation, while larger NVOCCs are able to negotiate NSAs with VOCCs thereby obtaining confidential prices under service contracts. These small NVOCC shippers, and their

shippers' associations, such as ISA, will be at a disadvantage in competing with large NVOCCs and their shippers' associations as a result of the Commission's rule.

The unintended results of the Commission's rule are to intensify the disadvantage of small NVOCCs in competing with large NVOCCs by making their principal costs public, and to substantially reduce competition by the disadvantaged NVOCCs, a fact which the Commission failed to consider in making the finding required under section 16, namely that the action it takes will not result in a substantial reduction in competition.

It is our position that although the Commission made a finding that the exemption itself "will not result in substantial reduction in competition," that did not relieve it of the need to find that the restriction added to the rule barring NVOCCs from participating in NSAs as shippers will not result in a substantial reduction in competition. In fact, the restriction in the Commission's rule will further reduce competition by the smaller NVOCCs, and their shippers' associations, by requiring them to continue to pay tariff rates for their underlying transportation (purchased from NVOCCs) while allowing larger NVOCCs, and their associations, the ability to enter into confidential agreements covering the purchase of underlying ocean transportation from VOCCs at non-tariff rates.

Small shippers are at a disadvantage in obtaining ocean transportation because they have to use an intermediary in order to ship by vessel operators. This was the

subject of vigorous debate in the Senate in considering whether to amend the bill that became OSRA so as to authorize NVOCCs to offer service contracts. The amendment to the Senate bill which would have allowed both NVOCCs and VOCCs to offer service contracts was defeated so as to create a material advantage for VOCCs to the disadvantage of NVOCCs (105 Cong. Rec., Senate 6109-6115).[6] By withholding the benefit of its rule from the small NVOCCs who need to purchase ocean transportation from carrier NVOCCs, the Commission is furthering this competitive disparity between large and small shippers.

In any event, we respectfully submit that before the Commission can make this rule effective, it must find that the restriction which the Commission attached to its exemption, viz, the prohibition against NVOCC shippers, and their shippers'

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6. Senator Slade Gorton, the proponent of the amendment to authorize service contracts for NVOCCs, highlighted the discrimination against small shippers stating in part:

> "As this bill was debated and reported form the Committee on Commerce, it treated both of these groups in an identical fashion. Each got the benefits of competition.
>
> "Somewhere, however, between the Commerce Committee and the floor, the big boys got together behind closed doors, and a combination of the ocean carriers and the longshoremen's unions, working with a handful of Senators, determined that the small business people would not get these advantages, that they would continue to have to operate, under most circumstances, under the requirements of the 1984 act.
>
> "Under the 1984 act, they were treated identically. If this bill passes without my amendment, they will no longer be treated identically. The small shipper will be discriminated against. The small businessman who is a freight forwarder will be discriminated against. The big guys will get away with something." (105 Cong. Rec., Senate at 6110).

associations, from entering into NSAs with NVOCCs as carriers will not result in a substantial reduction in competition. This it has not done.

3. The NSA Rule Barring NVOCCS and their Shippers' Associations from Shipping under NSAs is Beyond the Commission Jurisdiction and Unjustly Discriminates against NVOCCs.

We also question the statutory authority of the Commission to bar NVOCCs and their shippers' associations from shipping under NSAs. In the Shipping Act, Congress, by definition, 46 U.S.C. App. §1702(22) (D) and (E), specifically provided that shippers' associations and NVOCCs are shippers under the Act. We maintain that this statutory enactment precludes the Commission from excluding NVOCCs and their shippers' associations from being shippers under NSAs.

Further, the prohibition against NVOCCs and their shippers' associations tendering shipments to other NVOCCs under the subject rule discriminates against NVOCCs, particularly small NVOCCs. This discrimination, which is based solely on the identity of the shipper, violates a fundamental principle of transportation law. Two shippers who ship the same cargo under the similar conditions cannot be treated differently. See Cartwright International Van Lines, et al. v. Sea-Land Service, Inc. 26 SRR 469 (1992). Cf. I.C.C. v. Delaware Lackawanna & Western Railroad Co., 220 U.S. 235, 252 (1911).

This discrimination is further exacerbated by the additional prohibition of the NSA rule that bars shippers' associations from entering into NSAs on behalf of their

NVOCC members. This prohibition is contrary to the express purpose of Congress in authorizing shippers' associations to obtain volume rates and service contracts on behalf of their members. Failing to allow shippers' associations with NVOCC members to ship under NSAs is inconsistent with this congressional purpose and would give rise to unjust discrimination against smaller NVOCCs.

4. The Commission's Sole Reason for Prohibiting NVOCCs as Shippers under NSAs Is Refuted by the Pro-competitive Results of Carrier-to-Carrier Co-loading Agreements Among NVOCCs.

The Commission's sole reason for prohibiting NVOCCs from shipping under NSAs is its apprehension that NVOCC shippers might use NSAs to engage in anticompetitive activity which a court might find to be exempt from the antitrust laws by reason of section 7(a) (2) (B) of the Act. There is no discussion by the Commission of pro-competitive benefits, including lower prices to shippers, that would result from NSAs in which a small NVOCC, or its shippers' association, is a party to an agreement with a carrier NVOCC; nor has the Commission identified any ocean shipping trade in which such NSAs would be likely to result in a substantial reduction of competition. Without such consideration, we maintain that the Commission's restriction is unsupportable and is contrary to the experience of NVOCCs who have participated in carrier-to-carrier co-loading agreements for many years. (46 C.F.R. §520.11(c) (iii)). NVOCC-NVOCC NSAs are substantially analogous to carrier-to-carrier co-loading

agreements between NVOCCs. These agreements have been pro-competitive and have not resulted, to our knowledge, in any activity violative of the antitrust laws.

Under the Commission's carrier-to-carrier co-loading rule, a tendering NVOCC agrees to pay a carrying NVOCC a rate lower than the tariff rate which, like a rate in an NSA, is confidential. Since the rates in carrier-to-carrier co-loading agreements are not disclosed, these agreements are, in effect, the equivalent of NSAs. Carrier-to-carrier agreements, however, cannot be entered into by shippers' associations. For this reason alone, the restriction against an NVOCC entering into an NSA with another NVOCC should be eliminated. Failing to do this will withhold the benefits provided for in OSRA which encourages shippers' associations as a means by which smaller NVOCCs can band together and obtain sufficient buying power to compete on a more equal basis with larger NVOCCs. The restriction in the Commission's rule deprives smaller NVOCCs of this benefit.

Further, we maintain that it is illogical for the Commission to justify its prohibition against NVOCCs' participating as shippers in NSAs on the ground that NVOCCs might engage in activity that violates the antitrust laws based on an apprehension that a court might determine that the Commission's exemption from tariff publication carries with it immunity from the antitrust laws. Since, as shown above, the Commission presently allows NVOCCs to obtain other than tariff rates from other NVOCCs under its carrier-to-carrier co-loading rule without any concern about

immunity from the antitrust laws, the restriction to which we object cannot logically be justified on that basis. We maintain that there is no more likelihood of antitrust violations presented by NSAs between NVOCCs than there is when two NVOCCs co-load on a carrier-to-carrier basis as allowed by the Commission's regulation.[7] The principal effect of the restriction is to foreclose such agreements by shippers' associations, which will undercut Congress' attempt to strengthen the bargaining position of smaller purchasers of ocean transportation.

5. Our Suggested Solution.

The Commission has made clear that the only reason for excluding tendering NVOCCs from entering into NSAs with carrying NVOCCs is because of the "possibility" that a court may permit the Commission's exemption to be asserted as a defense to a claimed violation of the antitrust laws.[8]

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7. We submit that similarly NVOCC-NVOCC NSAs will promote, rather than suppress competition. For this reason, should there be any concern that activity of NVOCCs under NSAs may violate the antitrust laws, the activity should be evaluated under a rule of reason antitrust analysis which weighs the pro-competitive benefits against the alleged restriction of competition, rather than being considered as a per se violation. See National Society of Professional Engineers v. United States, 435 U.S. 679, 691, 98 S.Ct. 1355 (1978).

8. The Department of Justice is not concerned about this. See DOD comments, at p. 3, viz. "...an exemption from the requirements of section 8 [of the Shipping Act] would not (and could not) exempt concerted activity from the antitrust laws."

We suggest that this possibility can be avoided by amending the rule so as to specifically provide that the Commission will accept for filing only those NSAs which the NVOCC parties certify will not result in a substantial reduction in competition.[9] If the rule is amended in this manner, antitrust immunity would not attach by reason of the section 7(a) (2) (B) exemption because antitrust immunity applies only to activity or agreements "undertaken or entered into with a reasonable basis to conclude that....(B) it is exempt under section 1715 [Section 16] of this title from any filing or publication requirements of this chapter." (Emphasis supplied). If the Commission's rule makes clear that the only NSAs that can be filed are those which the parties certify will not substantially restrict competition, the NVOCC parties would not be able reasonably to contend that the Commission's exemption immunized their activities from the antitrust laws.

A proposed amendment that the Commission's NSA rule, Part 531, is Attachment A hereto.

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9. Support for this proposal is found in the practice of the Federal Energy Regulatory Commission of accepting for filing tariffs only if they met a prior condition imposed the agency to ensure compliance with the agency's statute. This practice was affirmed by the Court in California v. Federal Energy Regulatory Commission, 383 F.3d 1006, 1012 (9th Cir. 2004), relied on by the Commission. By analogy, our proposal is that the FMC allow NVOCCs as shippers under NSAs subject to the condition that they certify that the NSA as filed will not result in a substantial reduction in competition, which certification will bring the NSA within the finding required by Section 16 of the Act.

RELIEF REQUESTED

For the above reasons, we respectfully request the Commission to grant this petition for reconsideration and allow NVOCCs, and shippers' associations with NVOCCs members, to participate as shippers in NSAs and, if determined by the Commission to be necessary, to amend the rule to specifically provide that the only NSAs which can be filed with by the Commission are those NVOCC parties certify will not result in a substantial reduction in competition. Should the Commission determine not to grant the relief requested, we ask that the Commission terminate this proceeding for the reason that the NSA rule clearly contravenes the tariff requirement of the Shipping Act, as amended.

We further respectfully request that the Commission stay the rule issued in this proceeding until the Commission issues a final decision on this petition for reconsideration.

Respectfully submitted,

INTERNATIONAL SHIPPERS' ASSOCIATION, INC.

By 

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Dated: January 7, 2005

ATTACHMENT A

ISA's Proposed Modifications and Additions to the Part 531 Rule to Authorize NVOCCs and Shippers' Associations with NVOCC Members to be Shippers under NSAs

§531.3(o) – Amend the definition of "NSA Shipper" by deleting the stricken sentence:

> NSA shipper means a cargo owner, the person for whose account the ocean transportation is provided, the person to when delivery is to be made or a shippers' association. ~~The time does not include NVOCCs or shippers' association whose membership includes NVOCC~~.

§531.6 - Add the following provisions:

An NVOCC as a carrier and an NVOCC as a shipper which enter into an NSA must certify that their activity under the NSA will not result in a substantial reduction in competition. An NSA which fails to contain the required certification will not be accepted for filing.

CERTIFICATE OF SERVICE

I hereby certify under that I have this 7th day of January 2005, served a copy of the foregoing document upon all parties of record by e-mail, acknowledgment of receipt requested, except for the following persons served by first-class mail, postage prepaid:

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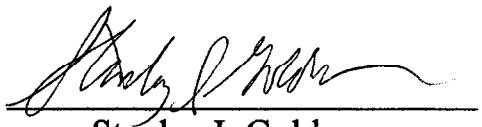

Stanley I. Goldman

Dated: January 7, 2005